

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LOLITA J. MULLINS**  
Claimant

VS.

**USD 229**  
Self-Insured Respondent

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Docket Nos. 1,044,665  
& 1,044,666

**ORDER**

Respondent appealed the July 14, 2009, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts.

**ISSUES**

Claimant alleges she fell at work on an icy sidewalk on December 23, 2008, and injured her head and neck and aggravated neck and upper extremity symptoms she had previously developed. That accident is the subject of Docket No. 1,044,665. Claimant also alleges the work she performed for respondent through March 4, 2009, caused repetitive trauma injuries to her left upper extremity, both shoulders, upper back, and neck. The repetitive trauma injury is the subject of Docket No. 1,044,666.

In the July 14, 2009, Preliminary Decision, Judge Yates Roberts designated Dr. Frank Holiday to evaluate and treat claimant's cervical condition. Respondent requests the Board to reverse that decision for the reason that claimant's neck and left upper extremity problems are allegedly from a particular accident that occurred at work lifting a garbage can liner in November 2008 for which claimant failed to provide timely notice.

Claimant, however, argues the Board should affirm the Preliminary Decision as the medical evidence shows claimant complained of repetitive injury shortly after her workload increased due to staff cuts. Moreover, she argues the only medical evidence addressing the cause of her injuries is from Dr. Stuckmeyer, who indicated claimant had a gradual onset of symptoms that were aggravated by her December 23, 2008, fall. Claimant also maintains she provided respondent with timely notice of her repetitive trauma injuries as she notified respondent she injured herself at work upon learning that from Dr. Smolen. Accordingly, claimant asserts the date of accident for her repetitive trauma injuries is the

date (which the Judge found was March 3, 2009) that Dr. Smolen suggested her injuries were related to her work.

The issues before the Board on this appeal are:

1. Did claimant's present injury and condition result from a November 2008 accident at work or from repetitive trauma she sustained at work through March 4, 2009?
2. Did claimant provide respondent with timely notice of her alleged cumulative trauma accident?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Claimant works for respondent, which is a school district, as a lead custodian. Every day claimant removes trash from each room, sweeps, mops, vacuums, and scrubs walls and floors. She also moves furniture and lifts chairs onto desks. She is left-handed.

According to claimant, she gradually developed symptoms in her neck and left upper extremity as she worked for respondent. She believes she first noticed her symptoms in November 2008, which was approximately a month after respondent had reduced its staff and increased her workload. Claimant testified, in part:

Q. (Ms. Burkhead) And in November of '08 tell the Court what you experienced physically?

A. (Claimant) Well, just from pulling the trash bags out of the trash cans, because they get pretty big and heavy, and I noticed some pain in my neck. And so when I would get off work I'd go home and put Bengay on my neck or something like that. Then I started having a lot of pain and it kept getting worse and it was going down my arm. I thought I was having a heart attack.<sup>1</sup>

In addition to lifting bags of trash, claimant also now attributes the onset of her symptoms to vacuuming, mopping, and sweeping.

Claimant's family has a strong history of heart disease. Thinking she was having heart problems, on December 10, 2008, claimant sought treatment from her personal

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<sup>1</sup> P.H. Trans. at 14-15.

physician, Dr. Melanie L. Smolen. Claimant told the doctor at that time she was having left-sided neck pain, pain radiating down her left arm, and tingling in her left hand. Claimant also denied any injury and told the doctor she was not sure if her symptoms were related to work. The doctor began an evaluation of claimant's heart and determined it was okay.

On December 23, 2008, claimant slipped and fell on an icy sidewalk in front of the school where she worked and struck the back of her head on the ground. Since that accident, claimant maintains she has experienced dizziness, nausea, and headaches. Claimant also testified the December 23, 2008, fall worsened the symptoms she was already having in her neck and left arm. Other than missing a few days from work following the fall, claimant continued to perform her regular work. She asserts that as she continued to work her symptoms worsened.

In early January 2009, claimant saw Dr. Mario K. Yu for electrodiagnostic studies. Those studies suggested claimant had a left radial neuropathy or a left C7 radiculopathy. Dr. Yu felt claimant's signs and symptoms indicated a left C6-7 radiculopathy. The history noted by Dr. Yu indicated that about three weeks before, claimant had an onset of severe sharp pain in her left shoulder that spread to her hand and was accompanied by numbness and weakness.<sup>2</sup>

In late January 2009, claimant saw Dr. James A. Scowcroft pursuant to Dr. Smolen's referral. Claimant advised Dr. Scowcroft that her symptoms began about two months earlier when she was lifting a liner from a garbage can and felt pain down her arm radiating into the left hand. Dr. Scowcroft noted the following history:

[Claimant] is a 53-year-old female who comes in today complaining of neck pain going down into her left arm. The problem began about two months ago when, while at work, she was lifting a liner from a garbage can and felt pain in her arm radiating down into her hand. Since then, she has had persistent pain that goes down into the second and third digit on her left hand. She [*sic*] pain is described as a throbbing sensation. She rates it anywhere from 4 to 10 out of 10 on the Visual Analog scale. The pain is typically worse when she is active, especially if she is using her left arm. She seems to do better with activity restriction and oral medications.<sup>3</sup>

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<sup>2</sup> *Id.*, Resp. Ex. C.

<sup>3</sup> *Id.*, Resp. Ex. B at 1.

MRI of the cervical spine indicated claimant had multilevel degeneration and central canal narrowing. Dr. Scowcroft's impression was cervical radiculitis and he recommended a cervical epidural steroid injection.

On March 3, 2009, claimant asked Dr. Smolen if her symptoms could be related to work and was told yes. Thereupon, claimant notified respondent of her alleged cumulative trauma injuries.

At her attorney's request, claimant was evaluated by orthopedic surgeon Dr. James A. Stuckmeyer, who now recommends a neurosurgical consultation. The doctor saw claimant in both April and May 2009. Claimant told Dr. Stuckmeyer that she gradually developed neck pain and radicular symptoms into her left arm as a result of the work she performed for respondent. The doctor questioned claimant and "she stated that her workload had increased and she feels that as a result of the repetitive lifting of trash bags at work that the neck and arm symptoms gradually occurred."<sup>4</sup> She also told the doctor about her December 23, 2008, fall and sustaining further trauma to her neck, hands, and lower back. Finally, she told the doctor that due to the repetitive and continuous work activities she has developed bilateral hand pain, bilateral shoulder pain, and upper back and neck pain. She specifically told the doctor that since returning to work after her fall, she has had increasing neck and left arm pain.

Judge Yates Roberts granted claimant's request for medical treatment. The undersigned agrees. At this juncture, claimant's testimony that she repetitively lifted trash bags and that her workload increased in approximately October 2008 is persuasive. The undersigned finds that testimony is credible. Claimant also testified her neck and left upper extremity symptoms began gradually. The undersigned finds such evidence is credible as she denied any specific injury when she first saw Dr. Smolen on December 10, 2008. The history that claimant gave Dr. Smolen on December 10, 2008, supports the finding that claimant's symptoms began gradually rather than as the result of a single, traumatic accident. It is reasonable to conclude that had claimant experienced a single, traumatic accident while lifting trash bags, she would have reported that incident to Dr. Smolen rather than worrying her symptoms were related to her heart.

As pointed out by the Kansas Supreme Court in *Depew*,<sup>5</sup> symptoms from a repetitive trauma injury may not manifest themselves for some time after the trauma occurs.

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<sup>4</sup> *Id.*, Cl. Ex. 1 at 4.

<sup>5</sup> *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

[Depew's] injury is compression of nerves in her forearms as a result of repetitive trauma. It is an injury which may not be diagnosed or manifested until the trauma has been discontinued, thus complicating correlation of pain with the cause of the damage. She did not render an opinion, nor, as a layperson, could she as to the cause of damage to a nerve or nerves.<sup>6</sup>

And in *Murphy*<sup>7</sup> (also cited in *Depew*) the Kansas Supreme Court noted that a worker's injuries to the hands and arms did not manifest themselves simultaneously although they were aggravated simultaneously.

Because it is more probably true than not that claimant's neck and left upper extremity were injured due to cumulative or repetitive trauma, claimant's date of accident is governed by K.S.A. 2008 Supp. 44-508(d), which provides:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

Based upon the present record, the date of accident is when claimant provided written notice to respondent of her injuries. And the administrative file compiled by the Division of Workers Compensation indicates that date was March 9, 2009, when claimant filed her application for hearing in Docket No. 1,044,666.

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<sup>6</sup> *Id.* at 25.

<sup>7</sup> *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986).

Claimant gave respondent notice of her cumulative trauma accident on or about March 3, 2009, and, therefore, notice was timely.

In conclusion, the July 14, 2009, Preliminary Decision should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned affirms the July 14, 2009, Preliminary Decision entered by Judge Yates Roberts.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2009.

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KENTON D. WIRTH  
BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent  
Marcia L. Yates Roberts, Administrative Law Judge

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<sup>8</sup> K.S.A. 44-534a.